IN THE

Supreme Court of the United States

October Term, 1977

No. 77- **77-466**

LOUIS J. POMPONIO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Louis J. Pomponio, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming his conviction under 18 U.S.C. 2314.

Opinions Below

The opinion of the court of appeals (App. B *infra*) is unreported.

Jurisdiction

The judgments of the court of appeals (App. C, D, *infra*)[1] were entered on July 27, 1977. On August 22, 1977

[1] App. C is the judgment in 76-1485 affirming the district court's denial of a motion to dismiss based upon the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. 3161(e). App. D is the judgment in 76-1885 affirming the judgment of conviction.

the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Were the indictment and conviction obtained through abuses of the grand jury process and violations of regulations of the Internal Revenue Service?

2. Did the abuses of the grand jury system also deprive petitioner of his constitutional right to a speedy trial under the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. 3161(e)?

3. Did the district court impermissibly reduce the government's burden of proof by instructing the jury to convict unless it had a "substantial doubt" as to the petitioner's guilt?

4. Did the district court invade the province of the jury by a one-sided charge that the government had proven an essential element of a crime where the evidence was circumstantial, if not speculative?

5. Is the first paragraph of 18 U.S.C. 2314 applicable to a situation in which (a) the security transported in interstate commerce is taken from a person who was *not* defrauded, and (b) the defrauded person is induced to endorse a promissory note which was *not* transported in interstate commerce?

6. Are stock certificates "counterfeit" within the meaning of the fourth paragraph of 18 U.S.C. 2314 when (a)

they are issued by officers authorized by the corporate by-laws and state law to issue stock certificates; and (b) the stock certificates are substitutes for previously issued certificates to which the petitioner had legal title and in which no one else had a valid and existing security interest?

Constitutional Provisions, Statutes, Rules and Regulations Involved

The constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution. The statutes involved are 18 U.S.C. 2314 and the Speedy Trial Act of 1974, 18 U.S.C. 3161(e). The regulations and rules involved are Internal Revenue Service News Release No. 897, 7 CCH 1967 Stand. Fed. Tax Rep., §6832, and Rule 4, Rules of the United States District Court for the Eastern District of Virginia. These statutes, rules and regulations are reproduced in App. A, *infra*.

Statement

A. The Criminal Investigations by the Internal Revenue Service and by Grand Juries

Petitioner and his two brothers were builders and managers of high-rise office buildings in Northern Virginia. Beginning with 1970, the Civil Division of the Internal Revenue Service (herein called the "IRS") purported to conduct a civil audit of the fiscal affairs of the petitioner.[1] Its agents physically occupied petitioner's office with his

[1] The audits were of petitioner, his brothers (who were acquitted by the jury) and their corporate organizations. For convenience we refer to them collectively as "petitioner".

permission, and were granted full access to his records (123a).[3]

In fact, the purported civil audit was a cover for a criminal investigation of the petitioner by the IRS (see offer of proof, 121a-128a). The plan had originated among the Special Agents of the Intelligence Division of the IRS, the division in charge of criminal investigations which believed that the examination of the petitioner's records might reveal crimes by him. Those Special Agents thereafter communicated with the Civil Audit Division using it as an innocuous "front" to secure information.

This extensive, unrestricted examination of petitioner's records was not accompanied by any notice that he was in fact being subjected to a criminal investigation, as required by the IRS rules (App. A, *infra* p. 2a) and enforced by the court below in *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1970). Thus, petitioner was not advised that the IRS was "investigating the possibility of criminal tax fraud" "or that he had constitutional rights to remain silent and to retain counsel" (*Id.* at 811). Instead, the Civil Division conducted the audit outwardly in apparently routine fashion; secretly, it conferred throughout this period with the Intelligence Division and followed its suggestions as to the lines of inquiry.

In the summer of 1971 the case was formally, but still secretly, referred to the Intelligence Division. Nevertheless the Civil Audit Division continued to secure information from the petitioner and to transmit it to the Intelligence Division.

Petitioner did not learn that he was the subject of a criminal investigation until the service of subpoenas on

[3] "a" refers to the Joint Appendix on Appeal; "A" refers to the Appendix on the speedy trial issue.

January 19, 1972 returnable before a grand jury in the Alexandria Division of the Eastern District of Virginia, calling for his records, those of his brothers and the Pomponio organization in general. The grand jury did not read or examine the materials subpoenaed in its name, if indeed it even received them. Instead, the United States Attorney immediately turned the materials over to the IRS Intelligence Division where they were examined as part of its continued criminal investigation (121a-128a).

It was not until May 1972 that the government made an *ex parte* application to the district court for a Rule 6(e) order to permit the IRS officers to examine the records (124a). By that time, the IRS had been in unlawful possession of the records subpoenaed by the grand jury for approximately four months. There is no evidence that the grand jury ever actually engaged in an investigation of petitioner.

In July, 1972, a grand jury in Alexandria, Virginia was empaneled for the first time to hear the case against the petitioner and his brothers. It received from the United States Attorney or the IRS the Pomponio records which had been the subject of the January, 1972 subpoenas, and it issued additional subpoenas *duces tecum* for records sought by the United States Attorney.

In addition, grand juries sitting in Richmond, Norfolk, Newport News and New York City also issued subpoenas addressed to Pomponio employees, Pomponio corporations, banks, investors and other persons who did business with the Pomponios. None of these grand juries (with the possible exception of New York) was investigating any crime arguably within its territorial jurisdiction. Instead of indicting anyone, the Virginia grand juries in divisions outside of Alexandria (or the United States Attorney acting in their name), turned over the subpoenaed documents un-

examined by them to the Special Grand Jury sitting in Alexandria.

The result was an indictment found on September 24, 1973 by the Alexandria grand jury charging petitioner and others with various crimes, including income tax violations and violations of 18 U.S.C. 2314 (Indictment 73-270).

That indictment was superseded on November 14, 1973 by separate indictments, one of which, 73-303-A, charged *inter alia* the instant violation of 18 U.S.C. 2314. A conviction in that case was reversed by the court below which ordered a new trial (*United States* v. *Pomponio*, 517 F.2d 460 (4th Cir. 1975)). Petitioner sought certiorari in this Court to review matters not decided by the court below; the petition for certiorari was denied on December 8, 1975, *Pomponio* v. *United States*, 423 U.S. 1015.

On January 29, 1976 two new indictments were found by an Alexandria grand jury, one of which, 76-14-A, again alleged the instant violation of 18 U.S.C. 2314. Petitioner sought and secured additional time to prepare the two cases which were then set for trial respectively on April 12, 1976 and May 12, 1976.

Petitioner also moved to dismiss the new indictments for insufficiency (51a-52a) and prosecutorial misconduct (119a-120a); alternatively, petitioner moved to suppress the illegally obtained evidence (52a(1)-52a(10)). The motions were denied. With leave of the court, petitioner filed an offer of proof with respect to the charge of prosecutorial misconduct (121a-128a, App. E, *infra*).

In April, 1976 petitioner's counsels' investigation revealed that the term of the indicting Alexandria grand jury in case 76-14-A had expired on December 31, 1975 prior to the return of the indictment. Petitioner's motion

to dismiss the indictment was granted on April 9, 1976 over government objection (7a, 14a).

On the next working day, April 12th, the United States Attorney presented the case (for the fourth time)[4] to a grand jury sitting in Norfolk, Virginia, although all of the other indictments had been found by grand juries in Alexandria. The Norfolk grand jury returned the instant indictment (76-93) a few hours later. Petitioner moved again to dismiss the indictment, incorporating by reference the earlier motions and the offer of proof (17a, 14a). Petitioner also asserted the additional ground that the indictment had been deliberately obtained from a grand jury sitting in Norfolk, Virginia in knowing violation of the local rules of the district court (107a). The motions were denied.

Petitioner also moved to dismiss the indictment in 76-93 on the ground that he had been denied a speedy trial in violation of the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. 3161(e), (131a, 10A). The motion was denied by the district judge on the ground that petitioner had waived his rights by seeking a postponement of the trial on the preceding indictments, 76-14 and 76-15 (20A). Petitioner appealed to the Court of Appeals and sought a stay of the trial (1A). The Court of Appeals denied the application for a stay and deferred the government's motion to dismiss the interlocutory appeal pending an appeal from any future conviction (No. 76-1485, Order, May 6, 1976).

B. Indictment and Trial

The indictment was in two counts. Count 1 charged that petitioner had caused to be transported in interstate com-

[4] We refer to Indictments 73-270, 73-303, 76-14 and 76-93, *supra* pp. 6-7.

merce a cashier's check of the Continental Bank "knowing the same to have been taken and obtained by fraud" (33a). As a result of repeated demands for clarification by a bill of particulars or otherwise, the government ultimately conceded that the Continental Bank had not been defrauded.

Count 2 charged that petitioner had transported in interstate commerce "falsely made, forged, altered and counterfeit securities", *i.e.*, stock certificates of the Zachary Taylor Corporation (33a, 34a). At trial the court deleted the charge that the securities had been "falsely made, forged (or) altered", leaving only the charge of counterfeiting.

The government's case on Count 1 was based upon petitioner's procurement of John McShain's accommodation endorsement of petitioner's promissory note to the Continental Bank which issued a check to petitioner. The government claimed that McShain was defrauded into making the accommodation endorsement to the note which was not transported in interstate commerce.

The government's case on Count 2 rested upon the claim that petitioner had pledged stock in Zachary Taylor Corporation to Jerome Murray and then issued new stock certificates in the corporation to John McShain purporting to be all the stock in that corporation. The petitioner established that both sets of stock were issued by corporate officers whose authority to do so under the corporate by-laws and state law was accepted by the court below. (App. B, *infra*, p. 7a). The evidence showed further that legal title to the stock purportedly pledged to Murray had remained in the Pomponios because it was held in escrow and that it had never been delivered to Murray. There was no direct evidence that petitioner had caused the stock to be transported in interstate commerce.

After a three week trial, the court delivered a charge to the jury defining "reasonable doubt" as follows:

> "I can define reasonable doubt no better than to say that it means a doubt that is based on reason and *must be substantial* rather than speculative.
>
> "It must be sufficient to cause a reasonably prudent person to hesitate to act in the face of it in the more important affairs of his life" [emphasis supplied] (786a, 787a).

The Court also undertook to "comment briefly on the evidence" (791a). After noting that *both* counts of the indictment required proof by the government that petitioner transported or caused the securities to be transported in interstate commerce, the district judge added:

> "However, it seems to me that both the check and the stock certificates did travel in interstate commerce, to and from Arlington, Virginia and Philadelphia, and it seems to me reasonable to assume that if the other elements of the offense are present, that such travel was contemplated by the defendants, either as principals or aiders and abettors.
>
> "So, I would think you need not detain yourselves long on that aspect of the case.
>
> "Issues that remain, ..." (792a).

The jury deliberated for 17 hours over three days and found the petitioner guilty. The court imposed a sentence of one year.

The Court of Appeals affirmed the conviction, addressing itself only to two matters. It held that 18 U.S.C. 2314 was violated even if the bank had not been defrauded in issuing the check described in the indictment (App. B, *infra*, pp. 8a-10a). It also held that the stock certificates were "counterfeit", although they were issued by persons

authorized by law to do so, because they were intended to deceive McShain into believing that they constituted all the corporate stock (App. B, *infra,* pp. 6a-8a). Although the other issues were fully briefed, they were not discussed by the court.

Reasons for Granting the Writ

1. This case presents the important question of "the integrity of a criminal trial in the federal courts" *Mesarosh* v. *United States,* 352 U.S. 1, 13. The detailed charges against the government which the two lower courts have declined to adjudicate now call for the exercise of this Court's supervisory jurisdiction.

The integrity of the trial is challenged here by a series of acts of the Internal Revenue Service and of the United States Attorney described in detail in petitioner's offer of proof in the district court (App. E, *infra*).

a. The government's use of the Civil Division of the IRS as a cloak for a criminal investigation violated that agency's own regulations (IRS News Release No. 897, October 3, 1967 (App. A, *infra,* pp. 2a-3a)). Such was the holding of the court below in an earlier case, *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1970). This violation requires a reversal of the conviction under this Court's decision in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260.

The factual allegations of the detailed offer of proof in this case were not contested by the government or challenged by either of the lower courts. Instead, the district court stated that it was "not going to allow any evidence on what you refer to as the *Heffner* point. That in my view was fully explored in a prior hearing. I incorporated the Court's ruling and the evidence here at that time." (Tr. 7,

Mar. 26, 1976).[5] The district court was in plain error in relying upon a ruling by another judge in a trial under a prior indictment upon a motion made, not by the petitioner, but by a co-defendant, and based upon evidence significantly more limited than the offer of proof herein.

b. The second aspect of governmental misconduct lies in the issuance of grand jury subpoenas for petitioner's records that were not given to the grand jury but to the IRS Intelligence Division. While this was a violation of Rule 6(e), Federal Rules of Criminal Procedure, the more fundamental objection is that it was an abuse of the grand jury process which may not properly be used as a prosecutorial discovery device for the benefit of the United States Attorney or the IRS.

The affirmance by the court below, in view of the unchallenged factual statement on this point, is in conflict with the decisions of other appellate courts. See *United States* v. *Dardi,* 330 F.2d 316 (2d Cir. 1964), *cert. denied,* 379 U.S. 845; *Beverly* v. *United States,* 468 F.2d 732 (5th Cir. 1972); *United States* v. *Star,* 470 F.2d 1214 (9th Cir. 1972); *United States* v. *Doe,* 455 F.2d 1270 (1st Cir. 1972). See also *United States* v. *Beasley,* 550 F.2d 261 (5th Cir. 1977), petition for certiorari pending, No. 77-54.

This case presents much more than the grand jury's taking of evidence for an improper purpose. Here, the grand jury abdicated its historic function by subpoenaing material not for its own examination but solely for use by the IRS.

Misuse by United States Attorneys of the grand jury process in recent years has increasingly been the subject of concerned discussion by judges, commentators and the Congress. A most cogent discussion of the problem appears in District Judge Marvin E. Frankel's recent book,

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[5] Gov't Br. p. 106 in the Court of Appeals.

Frankel and Naftalis, *The Grand Jury, An Institution on Trial* (1977). See also, Clark, *The Grand Jury* (1975).

Quite recently, the same district court dismissed an indictment secured by the very Assistant United States Attorneys involved in the instant case because of their misuse of the grand jury process. *United States* v. *Litton Systems, Inc.* (Cr. No. 77-70A, E.D. Va., Alexandria Division).[6] This misuse of the grand jury system is also presented by the *Beasley* case, *supra,* pending in this Court. The subject is one upon which the lower courts urgently need this Court's guidance and concerning which citizens need this Court's protection.

c. Another prosecutorial abuse was the use of grand juries in four cities other than Alexandria to subpoena documents from the petitioner in the Alexandria Division. This procedure conflicts with the principle recognized by the First Circuit in *United States* v. *Doe,* 455 F.2d 1270 (1st Cir. 1972), (subpoenas claimed to search out evidence for the pending Ellsberg trial) and the decision of Judge Thomsen *In re Grand Jury Investigation of the Banana Industry,* 214 F. Supp. 856, 859 (D.Md. 1963). The conduct of the United States Attorney in the present case constituted "an abuse of one of the most effective discovery mechanisms yet devised—the grand jury" (8 Moore's Federal Practice ¶ 1608[1], at 16-100 (2d ed. 1970) quoted with approval, *United States* v. *Doe, supra.*

d. The history of grand jury abuse was capped in the present case by the United States Attorney's decision to present evidence to a Norfolk grand jury which indicted the petitioner on the same day. The significance of this

[6] Similarly, abuse of the grand jury process by United States Attorneys resulted in the recent dismissal of the indictment in *United States* v. *Phillips Petroleum Co.,* —— F.Supp. —— (No. 76-Crim. 117-B N.D. Okl. 1977). Copies of the opinions in these cases have been lodged with the Clerk.

shift to a division which lacked jurisdiction under the court rules lies less in the violation of the rules than in its indifference to the structure of the grand jury system. Even more significant, a three or four hour presentation of evidence to a grand jury in a case requiring the examination of a series of complex financial transactions involving hundreds of exhibits strongly suggests the *pro forma* character of the grand jury proceeding. This is not the grand jury envisioned by this Court in *Wood* v. *Georgia,* 370 U.S. 375. See also *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974); *United States* v. *Estepa,* 471 F.2d 1132 (2d Cir. 1972); *United States* v. *Gallo,* 394 F.Supp. 310 (D. Conn. 1975); *In re Grand Jury Investigation of Banana Industry, supra.*

2. The government's misconduct with respect to the grand juries following this Court's denial of certiorari on December 8, 1975 in the 303 case also presents a serious question of whether petitioner was denied his constitutional right to a speedy trial under the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. 3161(e). Under that statute petitioner should have been tried again within 60 days from this Court's action, namely by February 6, 1976. Instead, the government waited until 52 days had passed and then indicted petitioner on January 29, 1976 in Case 76-14, clearly too late for a trial in 60 days from December 8, 1975. But even if the government's delay were permissible, the fact is that the indictment must be disregarded because it was rendered by a grand jury whose term had previously expired (*supra,* pp. 6-7). The next indictment—the subject of this petition—was found on April 12, 1976, 125 days after this Court's action on December 8, 1977. The delay in filing the instant indictment was in violation of the express terms of the Speedy Trial Act of 1974, 18 U.S.C. 3161(e), which requires that "the trial shall commence within sixty days from the date the action

occasioning the retrial becomes final". The statute does give the Court the right to "extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final", but only "if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical" (*Ibid.*). These were not considerations that led the government to delay the filing of the indictment in 76-14; it made no claim of the unavailability of witnesses and there were no other "factors resulting from passage of time" which made trial within sixty days "impractical."

The government cannot justify the delay in the instant trial under 76-93 by relying upon an intervening indictment in 76-14 by a grand jury whose term had expired prior to the indictment. Nor was the district court justified in ruling that petitioner had somehow or other waived his right by requesting a delay in the trial in 76-14 under the invalid indictment (20A-22A). Petitioner made no request for a delay in the trial of the present indictment; instead, he moved to dismiss it because of the previous delay.

The case presents an important question of the construction of the Speedy Trial Act never considered by this Court. It poses the question of whether the government's cavalier treatment of the grand jury system by securing an indictment from an expired grand jury can extend its time to prosecute a defendant. This issue might well be considered by the Court, together with *United States* v. *McDonald*, No. 75-1892, *cert. granted*, —— U.S. ——, 45 U.S.L.W. 3822 (June 21, 1977), to review another aspect of the right to a speedy trial decided by the court below at 531 F.2d 196 (4th Cir. 1976.)[7]

[7] One of the rare appellate decisions under this statute has just been made by the Court of Appeals for the Second Circuit, *United States* v. *Carini*, No. ——, August 30, 1977 (New York Law Journal, Sept. 15, 1977, p. 1, col. 1).

3. The district court's charge of "substantial doubt" (*supra*, p. 9) upheld *sub silentio* by the court below, fails to conform to the constitutional requirement of an acquittal unless guilt is established beyond a reasonable doubt, and is in conflict with the decisions of other circuits.

(a) The requirement that guilt in a criminal prosecution be established beyond a reasonable doubt is an "historically-grounded right of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Brinegar* v. *United States*, 338 U.S. 160, 174. The reasonable doubt standard gives vitality to the presumption of innocence which is the cornerstone of our criminal justice system. See *Coffin* v. *United States*, 156 U.S. 432, 453. In *In re Winship*, 397 U.S. 358, 364, this Court held that the due process clause of the United States Constitution prohibits conviction of a criminally accused, "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." It added that "[i]t is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." *Id.* at 363, 364.

The district court followed neither the spirit nor the letter of this Court's views when it equated reasonable doubt with substantial doubt.

> "I can define reasonable doubt no better than to say that it means a doubt that is based on reason and *must be substantial* rather than speculative." (786a).

(b) The district court's charge conflicts with the recent criticism by other circuits of jury charges equating reasonable doubt with substantial doubt. See, *e.g.*, *United*

States v. *Alvero*, 470 F.2d 981 (5th Cir. 1972); *United States* v. *Muckenstrum*, 515 F.2d 568, 571 (5th Cir. 1975), *cert. den.*, 423 U.S. 1032; *United States* v. *Atkins*, 487 F.2d 257, 260 (8th Cir. 1973); *United States* v. *Kirk*, 496 F.2d 947 (8th Cir. 1974); *United States* v. *Byrd*, 494 F.2d 1275 (8th Cir. 1974); *United States* v. *Bridges*, 499 F.2d 179 (7th Cir. 1974), *cert. den.*, 419 U.S. 1010.

As the Fifth Circuit observed in the *Muckenstrum* case, a charge that ". . . a doubt must be substantial rather than speculative is confusing in that arguably it raises the burden from 'reasonable doubt' to 'substantial doubt' and would better be left unsaid." (515 F.2d at 571)

While the court below did not address itself to the problem, the government called its attention to confusion among the various panels of the 7th Circuit, culminating in *United States* v. *Crouch*, 528 F.2d 625 (7th Cir. 1976) which "cautioned against using . . . ["substantial doubt"] language in the future" (Govt. Br., p. 53). This led the government to suggest that if the court below agreed with the petitioner, "the conviction should be affirmed with an opinion which cautions the trial courts in this Circuit against using similar language in the future." (Govt. Br., p. 56). It argued, alternatively, that "the better view on the instruction at issue here is for this Court to endorse it." (*ibid*). We believe that instead the time has come for this Court to review the matter and to give its considered judgment on the subject so as to eliminate the differences among the circuits and the confusion within the circuits themselves.

4. The error in the district court's charge on substantial doubt was compounded by its virtual instruction to the jury that the petitioner had caused the transfer of stock in interstate commerce, *supra*, p. 9.

This was very serious because petitioner argued that the government had failed to establish a nexus between petitioner and the transportation of the stock certificates, essential elements of the offense charged under 18 U.S.C. 2314. See *United States* v. *Robinson*, 545 F.2d 301 (2d 1976). There was no direct evidence on this point and there remained a sharply contested issue of fact for the jury's determination.

The trial court's charge that the jury "need not detain yourselves long on that aspect of the case" (*supra* p. 9) was an additional pressure upon the jury in disregard of this Court's reminder in *Quercia* v. *United States*, 289 U.S. 466, 470, that "[t]he privilege of the judge to comment on the facts has its inherent limitations", and that the trial judge has the "duty . . . to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided' . . ."[8]

In *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969) the First Circuit struck down a conviction because of a far more subtle form of pressure on the jury, namely, a request for special findings to be made after the general verdict. "The constitutional guarantee of due process and trial by jury require that a criminal defendant be afforded the protection of a jury unfettered directly or indirectly." (*Id.* at 182).

5. Petitioner's conviction on Count 1 presents the important question of whether 18 U.S.C. 2314 applies to a case in which the security transported was not taken from the defrauded person. This issue has never been presented to this Court, or, so far as we know, to any appellate court.

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[8] The improper statement to the jury was not rendered meaningless by the prefatory remark that "my comment is based on my recollection of the evidence . . . ." (791a).

The only security recited in Count 1 of the indictment was the bank's check which was allegedly transported from one state to another in violation of the statute. But the government made no claim that the bank was defrauded. Rather the government claimed that McShain had been defrauded into giving petitioner an accommodation endorsement. That endorsement was never transported in interstate commerce.

Therefore, no property was taken from McShain and moved in interstate commerce, even if an accommodation endorsement can be deemed property or "security". The court below was therefore expanding the statutory language to permit a federal criminal prosecution for the interstate transportation of property from a person not defrauded because it was obtained by the proceeds of a prior fraudulent act committed upon a different person.[9]

The government's theory would permit prosecution under 18 U.S.C. 2314 of every intrastate fraud if the fruits of such fraud subsequently are used to obtain securities which travel in interstate commerce. This construction of 18 U.S.C. 2314 would effect a drastic expansion of federal jurisdiction in criminal law enforcement, altering sensitive federal-state relations and potentially over-extending limited federal police resources. *Cf. Rewis* v. *United States,* 401 U.S. 808, 812. Such a restructuring of the federal-state roles is not to be favored, at least in the absence of a clear congressional intention to do so. *Ibid.; United States* v. *Bass,* 404 U.S. 336, 349; *cf., Younger* v. *Harris,* 401 U.S. 37. Here, not only is there nothing in the legislative history of

[9] For example, under the government's theory, Section 2314 would reach the following situation:

> X sells Y a used car but misrepresents the condition of the car. The transaction is entirely intrastate. X then uses the proceeds of the sale to buy $5,000 worth of common stock of General Motors Corporation. The certificates of stock are transported by X in interstate commerce.

the statute warranting such a broad construction of the statute, but the language of the statute clearly indicates the contrary.

Indeed, it will be recalled that the statute was originally entitled the "National Stolen Property Act" and was directed against persons who stole automobiles and then transported those very automobiles across state lines. While the statute has been broadened from theft to fraud, and from automobiles to securities, the original conception of the statute must not be forgotten in determining its purpose.

This is the first case in which the government has attempted to expand the scope of 18 U.S.C. 2314 in the manner indicated. Such a long-standing interpretation of the limited scope of the statute is persuasive evidence that section 2314 does not reach the acts alleged in the present case. *Federal Trade Comm.* v. *Bunte Bros.,* 312 U.S. 349, 352; see also *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315.

Neither of the two cases cited by the court below is authority for its expanded interpretation of 18 U.S.C. 2314. *United States* v. *Sheridan,* 329 U.S. 379, involved "the transportation in interstate commerce of a specified forged check, knowing it to have been forged." The only question there was whether the defendant's intention to transport was an element of his crime. In *United States* v. *Walker,* 176 F.2d 564 (2d Cir. 1949), the victim gave the defendant checks, which, changed into other checks, were transported to another state. All these monies were fungible and belonged to the victim whose property was transported in commerce. In the instant case, McShain merely assumed a contingent obligation by endorsing a promissory note which was never transported in interstate commerce.

6. The Court of Appeals, in affirming petitioner's conviction on Count 2, also decided what it described as the "more difficult question . . . raised by [petitioner's] contention that the certificates were not counterfeit." (App. B, *infra*, p. 7a).

(a) That ruling does not satisfy this Court's distinction in *Gilbert* v. *United States*, 370 U.S. 650, between fraud and such concepts as forgery and counterfeiting. It also conflicts with other decisions of courts of appeals, including one by an earlier panel in the Fourth Circuit, *Greathouse* v. *United States*, 170 F.2d 512, 514 (4th Cir. 1948); *Marteney* v. *United States*, 216 F.2d 760 (10th Cir. 1954). See also *United States* v. *Jones*, 414 F. Supp. 964, 966-967 (D. Md. 1976).

Basically, the court below failed to distinguish between making a fraudulent statement and making spurious documents. As Justice Harlan said in *Gilbert*, *supra*, "[w]here the falsity lies in the representation of facts, not in the genuineness of execution, it is not forgery." The court below recognized that "[t]he corporation's charter and by-laws and the law of the state of incorporation conferred on [the petitioner and his brothers] . . . the power to issue stock" (App. B, p. 7a), including both stock to Murray and the additional stock to McShain. There was nothing counterfeit about the additional stock certificates. They were genuine certificates giving McShain a stock interest in the corporation. That the stock certificates may have been of less value than anticipated or bore allegedly deceptive numbers is, at most, proof of fraud. It is not proof of counterfeiting since "the genuiness of execution", the *Gilbert* standard, *supra*, is not disputed by the government.

(b) Independent of the foregoing, as a matter of law, the undisputed facts established that Murray retained no

stock interest. Legal title to the stock at all times remained in the petitioner and his brothers; neither the stock certificates nor the pledge agreements nor the underlying deed of trust were ever delivered to Murray. "While the deed was held in escrow, there was no delivery to the grantee and the legal title remained in . . . , the grantor." *Surratt* v. *Fire Association*, 43 F.2d 467, 471 (4th Cir. 1930).

There had been no valid pledge to Murray because neither the pledged property nor the pledge agreements were ever delivered. "The rule is fundamental that there is no pledge without delivery [cases cited]", *McCoy* v. *American Express Co.*, 253 N.Y. 477 (1929) (Cardozo, J.).

The Court of Appeals' decision must be taken as rejecting *sub silentio* this view of pledge law and is in direct conflict with the decision of the Court of Appeals for the Third Circuit, *In re Dolly Madison*, 480 F.2d 917, *affirming without opinion*, 351 F. Supp. 1038 (E.D. Pa. 1972): "[T]he simultaneous existence of an escrow and a pledge is a legal impossibility." *Id.* at 1042. This conflict requires resolution by this Court.

CONCLUSION

The petition should be granted for the reasons stated above.

Respectfully submitted,

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September 22, 1977

APPENDIX

APPENDIX A

1. 18 U.S.C. 2314 provides in relevant part:

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; [par. 1]

• • • • •

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited . . . [par. 4].

2. The Speedy Trial Act of 1974, 18 U.S.C. 3161(e) provides in relevant part:

> " • • • If the defendant is to be tried again following an appeal . . . , the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical."

3. Rule 6(e), Federal Rules of Criminal Procedure, provides as follows:

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Rule 6(e): Secrecy of Proceedings and Disclosure

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties . . . Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

4. IRS News Release No. 897, Oct. 3, 1967, reprinted in 7 CCH 1967 Stand. Fed. Tax Rep. § 6832, provides in relevant part:

> "In response to a number of inquiries, the Internal Revenue Service today described its procedure for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> "Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence

Appendix A

Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

"Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

"On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'

"If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

• • • • •

"IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons."

5. Local Rule 4, Rules of the United States District Court for the Eastern District of Virginia, provides in relevant part:

Division in Which Suits to be Instituted

Suits or prosecutions of which this Court has jurisdiction and venue, except where otherwise especially provided, shall be brought in the division (a) wherein the cause of action or any part thereof arose; or (b) wherein any of the defendants may reside; • • •

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1485

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO,

Appellants.

No. 76-1885

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS J. POMPONIO, JR.,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., *District Judge.*

(Argued June 9, 1977 Decided July 27, 1977.)

Appendix B

Before:

WINTER, BUTZNER and WIDENER,

Circuit Judges.

LEONARD B. BOUDIN (Victor Rabinowitz, Michael Lee Hertzberg, Eric M. Lieberman, Rabinowitz, Boudin and Standard on brief), *for Appellants.*

FRANK W. DUNHAM, JR., Assistant United States Attorney, JOSEPH A. FISCHER, III, Assistant United States Attorney (William B. Cummings, United States Attorney, Robert F. McDermott, Jr., Assistant United States Attorney, James R. Hubbard, Assistant United States Attorney; Stephen Wegliar, Trial Attorney, Criminal Division, U.S. Department of Justice on brief), *for Appellee.*

BUTZNER, *Circuit Judge:*

Louis J. Pomponio, Jr., appeals from a judgment convicting him of violating the National Stolen Property Act, 18 U.S.C. § 2314, which proscribes the interstate transportation of counterfeit securities and securities taken by fraud. Though he assigns numerous errors, only two merit discussion. First, Pomponio claims that the stock certificates he is charged with transporting were not counterfeit. Second, he alleges that the cashier's check in issue was not "taken by fraud" within the meaning of the statute. We affirm the district court's judgment.

Appendix B

I

In October, 1970, Pomponio and his two brothers pledged to Jerome S. Murray all of the stock of the Zachary Taylor Corporation, represented by certificates numbered 1, 2, and 3, as collateral for the performance of an obligation of another Pomponio corporation.

In June, 1971, Pomponio pledged the same stock to John McShain without securing a release from Murray. He accomplished this by buying another stock book, issuing certificates 1, 2, and 3 from the new book, sending them from Virginia to McShain in Pennsylvania, and again representing that these certificates were all of the stock of the Zachary Taylor Corporation.

Upon receipt of the pledged stock, McShain endorsed a promissory note executed by Pomponio and his brothers payable to the Continental Bank in the amount of $3,800,000. Relying on McShain's endorsement, the bank issued a cashier's check for $2,000,000 to the Pomponios and held the balance of the loan in an escrow account. Pomponio then carried the check from Pennsylvania to Virginia.

II

Title 18 U.S.C. § 2314 provides in part: "Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any . . . counterfeited securities . . . knowing the same to have been . . . counterfeited" shall be fined, etc.

The evidence discloses that Pomponio acted with fraudulent intent and that he caused the stock certificates to be transported in interstate commerce.[1] Therefore, his as-

[1] Pomponio was also charged with violating 18 U.S.C. § 2, which provides:

Appendix B

signments of error with respect to these elements of the statute need no extended discussion. A more difficult question is raised by his contention that the certificates were not counterfeit.

The record establishes that Pomponio and his brothers were the sole stockholders, officers and directors of the Zachary Taylor Corporation. The corporation's charter and by-laws and the law of the state of incorporation conferred on them the power to issue stock. Pomponio contends that these undisputed facts establish that the certificates were not counterfeit. He bases his defense on cases that draw a distinction between making a false and fraudulent statement in a document, which is not punishable under the statute, and making a spurious or fictitious document, which is punishable as a forgery. *See, e.g.*, Gilbert v. United States, 370 U.S. 650 (1962); Marteney v. United States, 216 F.2d 760 (10th Cir. 1954); and Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948). Pomponio argues that although the stock certificates may have represented 50% of the stock of the corporation rather than 100% as he had claimed, such a misrepresentation, even if fraudulent, does not make them counterfeit.

The difficulty with Pomponio's position is that he did much more than make a fraudulent misrepresentation to McShain about the pledged certificates. To allay suspicion, he purchased another stock book and simulated the original certificates pledged to Murray by numbering the new certificates 1, 2, and 3.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States v. Smith, 318 F.2d 94, 95 (4th Cir. 1963), observes that " 'Counterfeited' means imitated, simulated, feigned or pretended." In United States v. Anderson, 532 F.2d 1218, 1224 (9th Cir. 1976), the court quoted as a frequently approved definition of counterfeit "an imitation of a genuine document having a resemblance intended to deceive and be taken for the original." In light of these definitions, we conclude that Pomponio counterfeited his corporation's original stock certificates numbered 1, 2, and 3 by executing a second set of certificates bearing the same numbers. Consequently, he violated the Act when he caused the counterfeit securities to be transported in interstate commerce.

III

Title 18 U.S.C. § 2314 also provides in part: "Whoever transports in interstate . . . commerce any . . . securities . . . knowing the same to have been . . . taken by fraud" shall be fined, etc.

The government charged that Pomponio violated this statute when he carried the Continental Bank check from Pennsylvania to Virginia. It asserts that McShain was the principal victim of Pomponio's fraud and acknowledges that the bank was not defrauded because it obtained all that it sought—McShain's valid endorsement on Pomponio's promissory note.

Pomponio insists that the statute requires that the person from whom the security is "taken" be the victim of the fraud. Accordingly, he contends that because the bank was not defrauded, the check was not "taken by fraud" within the meaning of the statute. He argues that, at most, the endorsement on the promissory note was "taken by

fraud," but that note did not travel in interstate commerce and cannot be the basis for conviction.

We believe § 2314 was not meant to be applied so restrictively. The plain language of the Act does not impose any requirement that the security transported in interstate commerce be taken directly from the person who was defrauded. The imposition of such a requirement by judicial gloss would defeat the purpose of the Act. In United States v. Sheridan, 329 U.S. 379, 384 (1946), the Court emphasized that Congress enacted the statute to facilitate federal-state cooperation in apprehending and punishing criminals who utilize the channels of interstate commerce. In explanation of congressional intent the Court said:

> Congress had in mind preventing further frauds or the completion of frauds partially executed. But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent. This was indeed one of the most effective ways of preventing further frauds as well as irrevocable completion of partially executed ones.

This broad interpretation of the statute was applied in United States v. Walker, 176 F.2d 564 (2d Cir. 1949). Walker fraudulently induced his victim to mortgage her property and give him the proceeds in the form of checks. He then cashed these checks and purchased travelers checks, which he carried from Texas to New York. Walker's defense was substantially the same as Pomponio's. He argued that even conceding that he took the mortgagee's checks from the victim by fraud, "he did not violate the

statute, because he did not carry either of them with him from Houston to New York." 176 F.2d at 566.

Rejecting Walker's defense, Judge Learned Hand wrote:

> We are by no means prepared to hold that, whenever any one fraudulently obtains the property of another, the proceeds are not also "taken feloniously by fraud", into whatever form he may convert them. That is the view of equity, and it is impossible to find any reason in the purpose of the statute to distinguish between the original property and its substitute.

176 F.2d at 566.

Pomponio's conduct was strikingly similar to Walker's. In both instances the fraudulent acts—the procurement of an endorsement and the inducement to execute a mortgage —did not immediately involve interstate transportation. Moreover, the banks issuing the securities that were transported were not the victims of the fraud.

Sheridan and *Walker* fully sustain Pomponio's conviction. His procurement of McShain's endorsement was an essential step—albeit a preliminary one—toward receiving the proceeds of the loan from the bank in the form of a cashier's check. Pomponio did not consummate his fraudulent scheme until he gained possession of the cashier's check. It is therefore apparent that the check was literally taken by fraud.[2] By transporting the check from Pennsylvania to Virginia Pomponio violated the statute.

We find no cause for reversal in Pomponio's other assignments of error.

Affirmed.

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[2] Webster's Third International Dictionary (1961 ed.) defines "take" as: "to get into one's hands or into one's possession, power, or control by force or strategem. . . ."

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1485

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1885

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS J. POMPONIO, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
Clerk

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL NO. 76-14-A

UNITED STATES OF AMERICA,

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO,
PAUL POMPONIO, CHARLES J. PILUSO.

CRIMINAL NO. 76-15-A

UNITED STATES OF AMERICA,

v.

LOUIS J. POMPONIO, JR., CHARLES J. PILUSO.

OFFER OF PROOF IN CONNECTION WITH MOTION TO DISMISS FOR MISCONDUCT

In connection with the motion of defendants to dismiss the indictments for prosecutorial misconduct, or, alternatively, to suppress, the defendants offer to prove:

Appendix E

1. *As To Violation Of I.R.S. Rules And Regulations*

The Pomponio investigation by I.R.S. orginated in a conversation between Robert Irish and Mr. Tarangelo, both of them Special Agents at the Alexandria office of I.R.S. in the latter part of 1969 or first few months of 1970. Tarangelo had seen a newspaper article reporting that the Pomponio family were heavy borrowers from the Royal National Bank in New York. He knew, as did Irish, that the Royal Bank was then under investigation by a Justice Department Strike Force and it was generally thought in government law enforcement circles that the said Bank was a funnel for the financing of enterprises carried on by organized crime. Tarangelo suggested that an investigation of the Pomponios and their relationship to the Bank might be appropriate to determine the connections, if any, between the defendants and "the Mafia". Irish agreed and spoke to Larry Richards, his supervisor. Thereafter Irish "pulled" copies of the Pomponios' tax returns and after examining them came to the conclusion that the standard of living they maintained, as reported in the press, was inconsistent with the modest level of income shown on their tax statements. This fact, together with the organized crime link suggested by the Royal Bank connection, prompted Richards and Irish to suggest to W. O. Miller, Head of the Civil Audit Section of the I.R.S. to conduct an investigation of the Pomponios' affairs through the Audit Division.

Miller agreed and Wills and several other agents were assigned to conduct an audit, which was purportedly civil but in fact was prompted by the belief of the Intelligence Division that there was a strong probability of criminality. Wills approached the Pomponios and advised them that he wished to examine their books. They gave him full run

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of the office and full access to all of the records of the Pomponio enterprises. Wills and several other agents worked at the Pomponio offices for about a year.

At no time during that time did Wills or anyone else advise the Pomponios that his investigation was in fact a criminal investigation and that he was seeking evidence of criminality. Throughout the period in question he reported to his supervisor, Miller, and Miller in turn conferred frequently with the Intelligence Division, particularly Richards, Irish and Eugene Bennett. Representatives of the Intelligence Division made frequent suggestions as to lines of inquiry which were then transmitted by Miller to Wills. The files of the Intelligence Division and the Audit Division will contain a number of memoranda on the subject passing between the Intelligence Division and the Civil Audit Division.

In July or August, 1971 Wills concluded his civil audit and formally referred the case to the Intelligence Division. At that time he physically moved out of the Pomponio offices but continued to request and to secure information from the Pomponios through their chief auditor, H. Burton Bates, Jr., and perhaps other employees. At no time did Wills or any other agent of the Civil Section advise Bates or any member of the Pomponio organization that the civil investigation had turned into a criminal investigation.

The Special Agents who worked on the Pomponio case were primarily Bennett, Jennings and Irish. They did not personally speak to anyone in the Pomponio organization; neither did they advise the Pomponios that there was a criminal investigation underway. Wills continued to work with the Special Agents for some time after the case was assigned to Intelligence.

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On January 19, 1972 the first grand jury subpoenas were served upon the Pomponio corporation. Up until this time they had no knowledge of the existence of a criminal investigation. The papers which were subpoenaed were in fact never examined in detail by any grand jury, if indeed they were even presented to a grand jury in any but a formal sense. Instead the papers were turned over to the Intelligence Division of I.R.S. where they came under the custody of Bennett. In May, 1972 an *ex parte* application was made to the court for a 6(e) order to permit I.R.S. officers to examine the records. In fact this was an effort to cure the illegal possession of the records by I.R.S.

2. *Abuse Of The Grand Jury Process*

As is noted above, the first subpoena was issued to the Pomponios calling for their books and records early in 1972. In fact those records were never considered in any meaningful way by a good jury but were turned over to I.R.S. for its examination. In July, 1972 a special grand jury was appointed to hear the Pomponio cases and the books and records were thereupon submitted to it. Other subpoenas were from time to time issued by that grand jury which carried on the investigation which ultimately led to indictments in cases number 268-73A; 269-73A; 270-73A; 303-73A; 304-73A and 305-73A.

All through the year 1973 grand jury subpoenas were issued, returnable not only before the special grand jury sitting in Alexandria, but before other grand juries sitting in Richmond, Norfolk, Newport News and New York. About 20-25 such subpoenas were issued, addressed to employees of the Pomponio organization and to banks, investors, lenders, and other persons who had business with the Pomponios. None of these grand juries (with the pos-

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sible exception of the one in New York) were investigating any crime which even arguably might have come within their respective territorial jurisdictions. None of them ever indicted anyone in connection with the documents subpoenaed from the Pomponios or witnesses relevant to this case. In fact the grand juries in question turned over both testimony and documents they received pursuant to the above-mentioned subpoenas to the special grand jury sitting in Alexandria.

At no time between 1971, when the first subpoena was issued and the end of 1973, was any 6(e) order issued by the District Court other than the 6(e) order mentioned above as having been issued in May, 1972. In September, 1973, three subpoenas were issued to three doctors who had treated members of the Pomponio family. Those subpoenas were returnable in Norfolk. The Pomponios' lawyer made a motion to quash the subpoenas which motions came on to be heard before Judge Lewis on August 31, 1973. He appeared surprised to find that any Pomponio subpoenas had been issued returnable other than before the special grand jury in Alexandria (see Transcript p. 4-13 in *United States* v. *John Doe #1*) and he directed that the subpoenas issued to the doctors returnable in Norfolk be quashed for that reason, with leave to issue new subpoenas returnable in Alexandria. After that incident no further subpoenas for Pomponio papers were issued by any grand jury in 1973, other than those returnable before the special grand jury in Alexandria.

The indictments handed down by the special grand jury were based upon a good deal of testimony and documentary material which, as it is indicated above, was presented to it in violation of Rule 6(e).

Appendix E

Rule 6(e) was not only violated in the wholesale transfer of grand jury documents from one grand jury to another without leave of court; other confidential grand jury documents together with oral testimony was made known to at least one person who ultimately testified at the 303 trial, namely Sidney Zneimer, and to his lawyer who were given access to documents secured from the Pomponios' files by the grand jury subpoenas and to testimony given by witnesses before the grand jury.

After the decision by the Court of Appeals reversing the conviction on Indictment No. 303, superseding indictments were handed down by a grand jury which was appointed in the latter part of 1975 or January, 1976. That grand jury on January 29th handed down the two indictments in question here. No *bona fide* hearings were held by that grand jury. No witnesses were called other than I.R.S. agents who summarized in much abbreviated form the evidence which had originally been presented to the special grand jury.

3. *Other Forms Of Prosecutorial Misconduct*

In their motion the defendants adverted to two other matters, both going to the integrity of the United States Attorney's office in the Alexandria Division. One relates to a charge of attempted extortion, the file on which has been sealed. Defendants stand ready to offer testimony as to that incident; the material in the sealed file may be read as an offer of proof. The other relates to the relationship between the United States Attorney in the Alexandria Division and one of the Judges in the Division. Documentary

Appendix E

evidence of that relationship has already been submitted to the court; that, too, may be read as an offer of proof.

Respectfully submitted,

Dated: March 29, 1976

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No. 77-466

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
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In the Supreme Court of the United States

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LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 558 F. 2d 1172.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1977. On August 22, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 25, 1977 (a Sunday), and the petition was filed on September 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2314, which proscribes the knowing transportation in interstate commerce of a security taken by fraud, requires that the security be taken directly from the victim of the fraud.

2. Whether the evidence showed that petitioner transported "counterfeit" securities, within the meaning of 18 U.S.C. 2314.

3. Whether petitioner's indictment and conviction were obtained through abuses of the grand jury process or violations of Internal Revenue Service regulations.

4. Whether petitioner was denied his right to a speedy trial under the Sixth Amendment or the Speedy Trial Act of 1974.

5. Whether the district court's instructions to the jury were erroneous.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of interstate transportation of counterfeit securities and securities taken by fraud, in violation of 18 U.S.C. 2314 and 2.[1] He was sentenced to one year's imprisonment on each count, the terms to run concurrently.

The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 6a-7a), showed that in 1970 petitioner and his brothers owned a number of real estate and development companies in Northern Virginia. In October 1970, petitioner pledged all of the stock in one of these companies, Zachary Taylor Corp., to Jerome S. Murray as collateral for the satisfaction of a commercial obligation. The stock certificates, numbered 1, 2 and 3, were delivered to Murray's agent, who placed them in a safe deposit box in a bank. On June 28, 1971, at a time when the Pomponio organization was facing

[1]The jury acquitted petitioner's brothers, co-defendants Peter and Paul Pomponio, on the same charges.

critical cash flow problems, petitioner went to Philadelphia, Pennsylvania, and pledged the same stock in the Zachary Taylor Corp. to John McShain, without notifying or obtaining a release from Murray. In order to convince McShain that he was receiving 100 percent of the corporation's stock, as he had been promised, petitioner bought a new stock book and labelled the pledged stock certificates as certificates 1, 2 and 3 in Zachary Taylor Corp.

In return for the stock, McShain endorsed a promissory note for $3,800,000 that had been executed by petitioner and his brothers payable to the Continental Bank of Philadelphia. McShain's endorsement was essential for the loan to the Pomponios because they were not known to the bank (Tr. 523). The bank thereafter issued petitioner a cashier's check for $2,000,000 and held the balance of the loan in an escrow account. Petitioner returned to Virginia with the cashier's check.

The first count of the indictment was based on the interstate transportation of the cashier's check received by petitioner as a result of his fraudulent procurement of McShain's endorsement on the promissory note. The second count was based on petitioner's transmission from Virginia to Pennsylvania of counterfeit securities in the Zachary Taylor Corp. for delivery to McShain.

ARGUMENT

1. 18 U.S.C. 2314 makes it a crime to transport in interstate commerce "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." Petitioner contends (Pet. 17-19) that this statute requires that the transported security must have been taken directly from the defrauded person and that

the evidence in this case showed that he obtained the check lawfully from the Continental Bank.

This argument, however, runs contrary to this Court's interpretation of Section 2314 and would defeat the congressional purpose in enacting the statute. This purpose was explained in *United States* v. *Sheridan*, 329 U.S. 379, 384 (footnote omitted):

> Congress had in mind preventing further frauds or the completion of frauds partially executed. But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent. This was indeed one of the most effective ways of preventing further frauds as well as irrevocable completion of partially executed ones.

Accordingly, the statute has been construed broadly to reach "all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property. * * * Congress by the use of the broad terms was trying to make clear that if a person was deprived of his property * * * by false pretense, by fraud, swindling, or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime." *Lyda* v. *United States*, 279 F. 2d 461, 464 (C.A. 5). See also *United States* v. *Bottone*, 365 F. 2d 389 (C.A. 2), certiorari denied, 385 U.S. 974; *United States* v. *Leggett*, 292 F. 2d 423 (C.A. 6), certiorari denied, 368 U.S. 914.

Petitioner fraudulently induced McShain to endorse a promissory note, which he then executed with the Continental Bank. As a direct result of the fraud

perpetrated on McShain, and in reliance upon McShain's endorsement that made him secondarily liable on the note, the bank issued a cashier's check, which petitioner immediately transported in interstate commerce. In light of this Court's broad interpretation of Section 2314 in *United States* v. *Sheridan, supra,* the court of appeals correctly determined that petitioner could not escape liability under the statute merely by utilizing an innocent third party bank to convert fraudulently obtained securities into checks. As Judge Learned Hand observed in *United States* v. *Walker*, 176 F. 2d 564, 566 (C.A. 2), certiorari denied, 338 U.S. 891, a case in which the defendant transported travelers' checks obtained from the proceeds of a mortgage he had fraudulently induced his wife to execute:

> We are by no means prepared to hold that, whenever any one fraudulently obtains the property of another, the proceeds are not also "taken feloniously by fraud," into whatever form he may convert them. That is the view of equity, and it is impossible to find any reason in the purpose of the statute to distinguish between the original property and its substitute.

See also *United States* v. *Caci*, 401 F. 2d 664, 672-673 (C.A. 2), certiorari denied, 394 U.S. 917.

This construction of the statute conforms with the congressional purpose and avoids what would otherwise be a gaping loophole in legislation that was intended to keep the channels of interstate commerce free from securities that have been fraudulently obtained.[2]

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[2]The recent decision in *United States* v. *Poole*, 557 F. 2d 531 (C.A. 5), supports this conclusion. There, a defendant in Louisiana fraudulently induced a Louisiana company to purchase non-existent machinery, deposited the company's check into his bank account, and

2. Petitioner contends (Pet. 20-21) that the stock certificates in the Zachary Taylor Corp. that he sent to McShain were not "counterfeit," within the meaning of Section 2314. In support of this contention, petitioner relies upon the fact that the charter and by-laws of the corporation allowed him, as a corporate officer, to issue additional stock (Pet. 8).

The power to issue genuine stock, however, did not entitle petitioner also to issue counterfeit stock, and the evidence clearly showed that petitioner did not treat the certificates as genuine. As the court of appeals pointed out (Pet. App. 7a), petitioner "purchased another stock book and simulated the original certificates pledged to Murray by numbering the new certificates 1, 2, and 3," rather than forwarding to McShain the preprinted certificates 4, 5 and 6 in the corporation's genuine stock book. Moreover, petitioner backdated the certificates to January 1970 (the date on the certificates pledged to Murray) rather than dating them June 1971, when he claims lawfully to have issued them (App. 810a-815a).[3] This conduct plainly fell within the frequently approved definition of counterfeit, "an imitation of a genuine

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then wrote a check for the same amount and sent it to a Texas bank. The court of appeals held that since there were sufficient surplus funds in the defendant's account to cover the check he sent to Texas, without applying the proceeds from the check fraudulently obtained from the company, the defendant did not violate 18 U.S.C. 2314. Significantly, the court observed that if the defendant had opened up a new account with the fraudulently acquired check and had then transported a check from the new account in interstate commerce, he could have been convicted of violating Section 2314 because in those circumstances there would only have been an inconsequential change in the form of the fraudulently obtained security (557 F. 2d at 535 n. 7).

[3]"App." refers to the joint appendix in the court of appeals.

document having a resemblance intended to deceive and be taken for the original." *United States* v. *Anderson*, 532 F. 2d 1218, 1224 (C.A. 9), certiorari denied, 429 U.S. 839. See *United States* v. *Morrow*, 537 F. 2d 120 (C.A. 5). Nor is petitioner's position aided by *Gilbert* v. *United States*, 370 U.S. 650, where the Court concluded that the word "forges" in 18 U.S.C. 495 was intended to have its common law meaning.

Petitioner's argument that the stock was not counterfeit because Murray retained no legal interest in the original certificates is equally unpersuasive. Murray in fact acquired legal title to the stock under the express terms of the pledge agreement. That agreement provided that it covered 100 percent of the issued and outstanding stock of the Zachary Taylor Corp. (App. 832a, 843a), namely certificates numbered 1, 2 and 3, and petitioner warranted that he would not issue any additional shares of stock in the corporation without Murray's written consent (App. 846a). The certificates were placed in a safe deposit box, where they remained until September 1972 (Tr. 212). Petitioner did not regain possession of the certificates or obtain an oral or written release from Murray before transferring simulated stock to McShain. Therefore, even though petitioner was an officer of the corporation, he had no authority to issue new stock by virtue of the pledge agreement.[4]

Finally, petitioner's alternative assertion that Murray never received legal title to the certificates because they were held by an escrow agent is also without merit. The parties agreed that the pledge would be governed by the

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[4]Indeed, petitioner testified that he operated under the belief that he could not issue new stock in the corporation unless Murray agreed to release the documents (Tr. 1922-1923).

Uniform Commercial Code of Virginia (App. 844a). Sections 8.9-304 and 8.9-305 of the Virginia U.C.C. (1965) provide that a fully perfected security interest in instruments attaches when the instruments are "held by a bailee, [and] the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest." Murray's interest in the stock thus attached at the time of the execution of the pledge agreement, and that interest was perfected when Murray's agent received the stock, notwithstanding the failure to deliver the certificates to Murray. Petitioner therefore possessed no legal authority under the agreement to pledge the stock to McShain.[5]

3. Contrary to petitioner's assertions (Pet. 3-7, 10-14), his indictment and conviction were not obtained through violations of Internal Revenue Service regulations or abuses of the grand jury process.

a. Petitioner's contention that I.R.S. regulations were violated, a contention that the government has always vigorously contested, is predicated solely upon an "offer of proof" (Pet. App. E) in the district court, in which petitioner alleged that the government used the Civil Division of the I.R.S. as "a cloak for a criminal investigation" (Pet. 10).

Petitioner had previously been convicted of violating 18 U.S.C. 2314, 1341 and 1343, but that conviction was reversed. *United States* v. *Pomponio*, 517 F. 2d 460 (C.A.

[5]Petitioner urges that the decision below conflicts with *In re Dolly Madison Industries, Inc.*, 351 F. Supp. 1038 (E.D. Pa.), affirmed without opinion, 480 F. 2d 917 (C.A. 3). In *Dolly Madison*, however, an escrow agreement specifically provided for redelivery of the stock to the seller in the event of a default by the buyer. Here, the pledge agreement was unequivocal, and Murray was vested with title from the moment his agent took possession of the stock. See *Appeal of Copeland*, 531 F. 2d 1195, 1201-1202 (C.A. 3).

4). At the former trial, petitioner's co-defendant made a pre-trial motion to dismiss the indictment, asserting that the government had violated I.R.S. regulations by conducting a criminal investigation under the guise of a civil tax audit. The trial judge (Judge Lewis) held an evidentiary hearing on the claim, at which the defendants presented testimony from I.R.S. agents who had been directly involved in the investigation, and denied the motion. Petitioner's counsel joined in the examination of the agents. On retrial, petitioner again raised the I.R.S. issue in a pre-trial motion to dismiss the indictment, which the government opposed. Judge Bryan, who presided over the second trial, declined to hear additional evidence on the motion, incorporated the evidence received in the prior hearing, and adopted Judge Lewis's ruling.[6] Petitioner then filed his offer of proof (Pet. App. E) and renewed his motion to dismiss the indictment. The court adhered to its ruling and denied the motion.

The district court acted well within its discretion in incorporating the record from the prior hearing and the ruling of Judge Lewis on the identical legal issue between the same parties and in refusing to hold a further evidentiary hearing based on a totally conclusory offer of proof. Cf. *United States* v. *White*, 514 F. 2d 205, 207-208 (C.A. D.C.); *United States* v. *Cohen*, 489 F. 2d 945, 952 (C.A. 2). Indeed, petitioner has not mentioned, much less contested, any of the evidence or testimony that was received at the former hearing. Morever, petitioner's

[6]Petitioner argues that the district court should not have denied his motion on the basis of the former evidentiary proceeding because the original motion to dismiss the indictment had been made by a co-defendant at the former trial. It is clear from the transcript of that hearing (App. 64a-105a), however, that although the motion had been made by one co-defendant, each of the defendants joined in the motion.

offer of proof consisted of nothing more than an unsubstantiated narrative, unaccompanied by affidavits or other evidentiary materials, and hardly supports his present claim that the evidence at the former hearing was "significantly more limited than the offer of proof herein" (Pet. 11).

b. Petitioner contends (Pet. 11-12) that the grand jury's function was abused by governmental misconduct in the issuance of subpoenas for petitioner's financial records. Again relying upon his conclusory "offer of proof," petitioner asserts that the government permitted agents from the I.R.S. Intelligence Division to have access to documents subpoenaed by the grand jury. Specifically, although in May 1972 the government obtained an order from the district court, pursuant to Rule 6(e), Fed. R. Crim. P., to allow I.R.S. agents to review these documents, petitioner claims that the agents had been given access to the materials for four months prior to the issuance of the order.

Petitioner's allegations were the subject of an evidentiary hearing in his former trial, where I.R.S. agents fully explained their participation in the criminal investigation. Based on this testimony, the trial judge rejected petitioner's claims. This essentially factual issue does not warrant further review. We note, however, that utilization of the services of expert government personnel to assist the grand jury in its inquiries has repeatedly been recognized as legitimate when dealing with allegations involving corporate or financial crimes, even in the absence of express judicial authorization. See, *e.g.*, *Coson* v. *United States*, 533 F. 2d 1119, 1120-1121 (C.A. 9); *United States* v. *Evans*, 526 F. 2d 701, 707 (C.A. 5), certiorari denied, 429 U.S. 818.[7]

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[7]This rule has now been codified. See Fed. R. Crim. P. 6(e)(2)(A)(ii), effective October 1, 1977.

c. Petitioner contends (Pet. 12) that the government misused the grand juries in three cities within the Eastern District of Virginia and in New York City to subpoena documents from him in Alexandria, Virginia.[8] However, the United States Attorney was required to use three grand juries within the Eastern District to investigate petitioner's criminal activities because of the limited time that a grand jury was allowed to sit in any one division of the district. At the time of the events at issue in this case, Local Rule 12 of the Rules of the United States District Court for the Eastern District of Virginia provided that a grand jury would sit beginning one Monday of each month, rotating so as to sit in each of the four divisions of the district three times a year. Since a grand jury empanelled in one division has territorial jurisdiction over offenses that may have taken place in another division of the same district, the government's practice was to present its cases to the grand jury wherever it happened to be sitting that particular month, regardless of the division in which the crime allegedly occurred. See *Salinger* v. *Loisel*, 265 U.S. 224; *United States* v. *Thompson*, 251 U.S. 407. Petitioner cites no authority, and we know of none, that supports his contention that the government is guilty of misconduct if it uses several grand juries within a district to gather evidence concerning crimes that occurred in one division of the district.[9]

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[8]In July 1972, a special grand jury in the Alexandria division of the Eastern District of Virginia was empanelled to investigate petitioner and his business practices. We presume that petitioner's challenge is limited to the government's acquisition of evidence from him by subpoenas *duces tecum* issued by grand juries sitting in various other divisions of the Eastern District of Virginia prior to the empanelling of the Alexandria special grand jury.

[9]*United States* v. *Doe*, 455 F. 2d 1270 (C.A. 1), involved an allegation that a grand jury in one district was being used to obtain

4. Petitioner argues (Pet. 13-14) that he was deprived of his right to a speedy trial under the Sixth Amendment and the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161(e), which provides in pertinent part:

> If the defendant is to be tried again following an appeal * * *, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days * * * if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

Although petitioner's first conviction under Section 2314 was reversed and the case was remanded for a new trial (517 F. 2d 460), he nonetheless filed a petition for a writ of certiorari, claiming that the court of appeals should have ordered entry of a judgment of acquittal or dismissal of the indictment. The petition was denied on December 8, 1975. 423 U.S. 1015. Petitioner was re-indicted on January 29, 1976. He then sought and received a continuance to prepare for trial (Pet. 14). On April 9, 1976, the district court dismissed the indictment, finding that it had been returned beyond the date of expiration of the grand jury's term. The government presented its case to the next available grand jury in the district, which sat in Norfolk on April 12, 1976.[10] Petitioner was indicted by the grand jury on April 12, and his four-week trial began on May 12, 1976.

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evidence for a *trial* in another district. *In re Grand Jury Investigation of Banana Industry*, 214 F. Supp. 856 (D. Md.), involved the question whether, in the absence of a court order, evidence gathered by a grand jury in one district could be transmitted to a grand jury in another district. These cases thus have no applicability to a situation where grand juries within the *same* district are investigating the commission of a crime within one division of that district.

[10]Petitioner complains (Pet. 12-13) that the government's presentation of its case to the Norfolk grand jury in three or four hours

Petitioner did not raise a speedy trial claim in the court of appeals and therefore is precluded from raising it in this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, not only does 18 U.S.C. (Supp. V) 3163(c) provide that the sanction of dismissal of the indictment for violations of the Speedy Trial Act does not become effective until July 1, 1979 (see *United States* v. *Amendola*, 558 F. 2d 1043, 1044 (C.A. 2)), but also dismissal would be wholly inappropriate here. Petitioner added to the delay of retrial by obtaining a continuance to prepare for trial (see 18 U.S.C. (Supp. V) 3161(h)(8)(A)) and the government acted expeditiously in securing a second indictment from the next available grand jury. Moreover, petitioner has failed to allege, much less to prove, that he suffered any prejudice as a result of the government's minor delay in securing a superseding indictment. *Barker* v. *Wingo*, 407 U.S. 514, 532.

5. Finally, the district court's instructions to the jury were correct.

a. Petitioner contends (Pet. 15) that the district court impermissibly reduced the government's burden of proof by instructing the jury that it could "define reasonable doubt no better than to say it means a doubt that is based on reason and must be substantial rather than

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strongly suggests the *pro forma* character of the proceeding. However, since the evidence establishing petitioner's violations of Section 2314 had previously been presented several times to other grand juries, it is quite understandable that the Norfolk proceeding was conducted expeditiously. In any event, the presumption of regularity of federal grand jury proceedings cannot be overcome on the basis of an unsubstantiated allegation such as petitioner's. *United States* v. *Johnson*, 319 U.S. 503, 513.

speculative."[11] When considered in the context of the entire charge (*United States* v. *Park*, 421 U.S. 658, 674), however, the instruction "correctly conveyed the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. 121, 140. The context makes clear that the district court used the word "substantial" to mean "real" or "nonspeculative" rather than "of great magnitude," as petitioner's argument implies. See *Coffin* v. *United States*, 156 U.S. 432, 453.

A trial judge has broad discretion to assist the jury in understanding the terms used in the charge, and he must be given appropriate latitude in his choice of the best way to do so. *Holland* v. *United States, supra*, 348 U.S. at 139-140. Although, as petitioner notes, various courts of appeals have cautioned trial judges to avoid the phrase

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[11]The court's charge stated in pertinent part (App. 786a-787a):

> You are told that whenever a defendant comes into court charged with a crime, he is presumed to be innocent.
>
> This presumption is an abiding one. It remains with that defendant throughout the trial, unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.
>
> The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government.
>
> This burden never shifts throughout the trial.
>
> The law does not require a defendant to prove his innocence or to produce any evidence. If the Government fails to prove a defendant guilty beyond a reasonable doubt, then the jury must acquit him.
>
> I can define reasonable doubt no better than to say that it means a doubt that is based on reason and must be substantial rather than speculative.
>
> It must be sufficient to cause a reasonably prudent person to hesitate to act in the face of it in the more important affairs of his life.

"substantial doubt," they have refused to reverse the conviction where, as here, the charge did not unduly emphasize the word "substantial" and, when viewed as a whole, the instruction on "reasonable doubt" was not subject to misinterpretation. See, *e.g.*, *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7); *United States* v. *Muckenstrum*, 515 F. 2d 568 (C.A. 5), certiorari denied, 423 U.S. 1032; *United States* v. *Fallen*, 498 F. 2d 172 (C.A. 8). Moreover, to the extent that there is a conflict among various panels of the Seventh Circuit on this issue, the conflict should be resolved by that court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

b. Petitioner claims (Pet. 16-17) that the district court's charge amounted to a "virtual instruction to the jury that petitioner had caused the transfer of stock in interstate commerce."

At the inception of the charge, the trial judge told the jurors that they were the sole judges of the facts (App. 772a). Before instructing on the elements of an offense under 18 U.S.C. 2314, the judge then stated (App. 791a), "I'd like to comment briefly on the evidence, and because my comment is based on my recollection of the evidence, and since it is your recollection that counts and is controlling, you are free to disregard the comment in its entirety." The judge proceeded to tell the jury that the government was required to prove the element of interstate transportation in both counts of the indictment beyond a reasonable doubt and to observe that the weight of the evidence indicated that there had been actual physical movement of the stock certificates and cashier's check between Virginia and Pennsylvania and that that movement had been contemplated by petitioner (App. 792a). Petitioner argues that these comments were improper because the government failed to establish by "direct evidence" a nexus between him and the transportation of the stock certificates.

The longstanding rule in the federal courts is that a trial judge may comment on the evidence so long as he does so fairly and he clearly states that the jury is the ultimate fact-finder and should rely upon its own memory and understanding of the facts. *Quercia* v. *United States*, 289 U.S. 466, 469. Cf. *Horning* v. *District of Columbia*, 254 U.S. 135, 138. The judge's comments in this case were not erroneous, because he charged the jury on each element of the offense and reminded the jury repeatedly that each element had to be proven beyond a reasonable doubt. Moreover, when the judge gave his view that the interstate movement of the securities had been contemplated by petitioner, he qualified his remarks by stating that the jury was bound by its own recollection of the evidence and that it was free to disregard his comment in its entirety. Finally, and most important, petitioner's claim of prejudice is illusory, since he did not contest the movement of the securities or cashier's check in interstate commerce.[12] Petitioner's theory throughout trial was not that the McShain transactions alleged by the government did not occur, or even that he was unaware of them, but that they were completely legal. Hence, the judge's comment on the undisputed evidence was a proper exercise of his discretion to focus the issues for the jury.

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[12]See *United States* v. *Natale*, 526 F. 2d 1160 (C.A. 2), certiorari denied, 425 U.S. 950, where the trial judge remarked in his charge to the jury that he did not "think" that there was any dispute over two elements of the offense. Although the defendant argued that this was in effect a directed verdict for the government on two elements of the offense, the court of appeals disagreed, noting that the judge had properly charged each element of the offense to the jury and that his comments on the evidence were not unfair because there had been no dispute over those elements at trial. 526 F. 2d at 1167. Petitioner argues that the proof in this case was disputed because there was no "direct evidence" that he personally transported the securities and check in interstate commerce. However, that is not a requirement of Section 2314. *Pereira* v. *United States*, 347 U.S. 1, 8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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